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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1303

CITY OF NEW ORLEANS AND ROBERT E. DEVELLE, DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS,

Petitioners,

versus

UNITED STATES OF AMERICA, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States of America and the Chief Justice and Associate Justices thereof:

City of New Orleans and Robert E. Develle, Director of Finance of the City of New Orleans, seeks a writ of certiorari to review a final decree of the United States Court of Appeals for the Fifth Circuit rendered on the 6th day of January, 1967, affirming the judgment of the United States District Court for the Eastern District of Louisiana granting the motion for summary judgment ordering the City of New Orleans and Robert E. Develle, Director of Finance of the City of New Orleans to pay over

and deliver to plaintiff, United States of America, et al, all cash and other obligations now held by the City of New Orleans and Robert E. Develle, Director of Finance of the City of New Orleans pursuant to the arrangements and agreement dated November 15, 1955 between Chrysler Corporation and City of New Orleans and Robert E. Develle, Director of Finance of the City of New Orleans, and in connection therewith, respectfully submits the following:

A.

OPINIONS BELOW

The opinion and decree of the United States Court of Appeals for the Fifth Circuit (Appendix"A" and Appendix "B") has not been reported. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the United States District Court for the Eastern District of Louisiana.

The per curiam decree of the United States Court of Appeals for the Fifth Circuit denying rehearing has not been reported and is annexed hereto as Appendix "C".

The opinion and decree of the Supreme Court of the State of Louisiana, dated June 25, 1959, has been reported at 238 La. 123, 114 So. 2d 579, and is annexed hereto as Appendix "D".

The opinion and decree of the Supreme Court of the State of Louisiana, dated June 4, 1962, has been reported at 243 La. 498, 145 So. 2d 11, and is annexed hereto as Appendix "E".

The decree of the United States District Court for the Eastern District of Louisiana, has not been reported and is annexed hereto as Appendix "F".

B.

JURISDICTION

(a) The abovementioned final decree of the United States Court of Appeals for the Fifth Circuit was entered on January 6, 1967, the day of rendition.

(b) Rehearing was applied for and denied on the 10th day of February, 1967.

(c) On the 17th day of February, 1967 an order was rendered staying the mandate for a period of thirty days to and including the 19th day of March, 1967.

(d) On the 13th day of March, 1967, an order was rendered extending the stay of the mandate to and including the 18th day of April, 1967.

(e) On the 10th day of April, 1967, an order was rendered extending the stay of the mandate to and including the 28th day of April, 1967.

(f) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1) because the decision rendered by the United States District Court for the Eastern District of Louisiana, and affirmed by the United States Court of Appeals, involves a federal question decided in a way in conflict with applicable decisions of this Court.

C.

QUESTIONS FOR REVIEW

The questions presented for review are:

(a) Is a Government contractor a purchasing agent of the Government so that vendors sell chattels directly to the Government because a facility contract requires the purchase orders of the contractor to be approved by the contracting officer before submitted to vendors?

(b) If the Supreme Court of Louisiana is in error as to a finding of law that a Government contractor was a purchasing agent of the Government and thereby sales by vendors would go directly to the Government, is the City of New Orleans bound, in the Federal Courts, under the doctrine of collateral estoppel, to this erroneous finding?

(c) Is the City of New Orleans bound under the doctrine of collateral estoppel to a finding of fact by the Louisiana Supreme Court that the Government was the owner of the chattels herein involved where that finding of fact was not an independent finding of fact but obligatory on the court under Louisiana procedure because it was stated as a fact in the petition of the plaintiff, and the matter was before the Court on an exception of no cause of action?

(d) Do the Federal Courts have jurisdiction to entertain a suit where the plaintiffs argued and briefed their State as well as Federal Questions of law and fact through the State Courts, and, having a right by law to writ of certiorari or appeal to the United States Supreme Court choose not to go to that court on review, but file a new suit in the Federal District Court?

D.

ORDINANCE INVOLVED

The ordinance involved is No. 15,201, C.C.S., (City of New Orleans), as amended, for which there is no published edition, reading, in pertinent part as follows:

> "Section 1. Be it ordained by the Commission Council of the City of New Orleans, that the following words, terms and phrases when used in this ordinance have the meaning ascribed to them in this section, except when the context clearly indicates a different meaning:
>
> " * * * (1) 'use' means and includes the exercise of any rights or power over tangible personal prop-

erty incident to the ownership thereof, except that it shall not include the sale at retail of that property in the regular course of business."

"Section 2. That there is hereby levied from and after January 1, 1941, for general municipal purposes, a tax upon the sale at retail, the use, the consumption, the distribution, and the storage in this City, of each item or article of tangible personal property, as defined herein, and upon the lease or rental of such property and the sale of services, within the City of New Orleans; the levy of said tax to be as follows:

"* * * (b) At the rate of one percent (1%) of the cost price of each item or article of tangible personal property when the same is not sold, but is used, consumed, distributed, or stored for use or consumption in this City; provided there shall be no duplication of the tax."

E.

STATEMENT OF THE CASE

This matter involves the petition for refund by the Chrysler Corporation and United States Government of "use" taxes in the sum of $405,905.00, together with interest thereon paid by the Chrysler Corporation to the City of New Orleans under protest. These taxes were paid because of an assessment by the City of New Orleans against the Chrysler Corporation for "unreported Taxable Sales" in the sum of $40,590,501.80 of tangible personal property acquired by the Chrysler Corporation and which property the Chrysler Corporation had shipped to it at the Michoud Plant in New Orleans.

These taxes were assessed to the Chrysler Corporation pursuant to the provisions of the Sales and Use Tax Ordinance of the City of New Orleans. This ordinance, as it is pertinent to this matter, provides in part as follows:

"Section 2. * * * That there is hereby levied from and after January 1, 1941, * * * a tax upon the sale at retail, the use, the consumption, * * * of each item or article of tangible personal property * * *; the levy of said tax to be as follows:"

"(a) At the rate of one percent (1%) of the sales price of each item or article of tangible personal property when sold at retail in this City; * * *"

"(b) At the rate of one percent (1%) of the cost price of each item or article of tangible personal property when the same is not sold, but is used, consumed, distributed, or stored for use or consumption in this City; * * * ".

This property was purchased by the Chrysler Corporation in order to perform a so-called "facilities contract" it had entered into with the United States Government under which Chrysler agreed to acquire the necessary tangible personal property in order to convert the Michoud Plant into a facility to produce tank engines. Chrysler was not to make any profit under the facility contract but by the terms of the facility contract Chrysler had the exclusive right to use these facilities in order to make tank engines for the Government. At the same time the facility contract was entered into, a supply contract was entered into between Chrysler and the Government for Chrysler to make tank engines for the Government, at a profit, using these facilities at Michoud.

The present matter is distinguishable from *Livingston vs. United States*, 179 F. Supp. 9, affirmed per curiam, 364 U.S. 281. In *Livingston*, the contractor (DUPONT) "entered the contract solely out of a high sense of public responsibility and not for profit." *United States vs. Boyd*, 378 U.S. 39, 84 S. Ct. 1518, (378 U.S. at page 45, Note 6).

The Chrysler Corporation, upon instruction by the

Government, paid the taxes under protest, and, again under instruction by the Government filed the suit for refund in the State District Court. (Transcript pages 65, 66 and 67.) Chrysler was reimbursed by the Government the amounts paid under protest before filing the suit for refund. The Government then intervened in the suit by Chrysler. As pointed out by the judgment of the United States Court of Appeals for the Fifth Circuit, Appendix "A", page 25, in the instant matter, "The United States through its Attorney General and the Department of Justice was in open, full command of this litigation. See List of counsel 114 So. 2d 579, 145 So. 2d 11. *Bros., Inc. vs. W. E. Grace Mfg. Co.*, 5 Cir., 1958, 261 F. 2d 428, 430-31."

The State District Court granted judgment in favor of the City and Chrysler and the Government appealed to the Louisiana Supreme Court. Chrysler and the Government argued and briefed in the State District Court and the State Supreme Court their Federal as well as State questions of law. The Louisiana Supreme Court reversed the District Court. *Chrysler Corporation vs. City of New Orleans* (238 La. 123, 114 So. 2d 579) (Appendix "D" of this petition). The Louisiana Supreme Court found, that because of the exception of no cause of action which was maintained by the District Court, under Louisiana procedure, the allegations of the petition that the Chrysler Corporation was not the owner of this property had to be taken as true. It further made the finding that:

> "Moreover, as we view the facilities contract, Chrysler was procuring or purchasing the property as an agent of the government.[3]"
>
> "[3]The facilities contract provides that all purchase orders issued by Chrysler for acquisition of equipment, machinery, etc., shall be subject to the prior written approval of the government, through its contracting officer."

See *Chrysler Corporation vs. City of New Orleans*, 114 So. 2d 579, at page 587, 238 La. 123, at p. 147, and appendix "D" of this petition at p. 51.

This was the only reason given by the Louisiana Supreme Court, from the record, in the two times this matter was before it, why the Government was the owner of this property.

On remand there was judgment in favor of Chrysler and the Government. The City appealed to the Louisiana Supreme Court. On this second appeal there was judgment in favor of the City. *Chrysler Corporation vs. City of New Orleans* (243 La. 498, 145 So. 2d 11). (Appendix "E" of this petition.)

Chrysler and the Government sought a stay of the mandate to permit them to take an appeal or writs to the United States Supreme Court. Two days before the stay expired a suit for the refund was filed in the United States District Court for the Eastern District of Louisiana. A motion for summary judgment was made by Chrysler and the Government. The City opposed the motion for summary judgment on several basis, among them being: There was a substantial difference as to a material fact, namely, (1) was the Chrysler Corporation or the Government the Owner of this property, and, (2) was Chrysler the purchasing agent of the Government with the property going, thereby, from the vendors to the Government; The District Court did not have jurisdiction for Chrysler and the Government did not have the right to proceed with the matter in the Federal District Court after having pleaded and argued their State as well as Federal questions of law through the State courts.

The motion for summary judgment was granted. The

City took an appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit affirmed on the basis that the City was collaterally estopped to challenge the finding by the Louisiana Supreme Court that the Government was the owner of this property. The Fifth Circuit made no independent finding as to ownership from the record. A re-hearing was denied and a stay was granted to permit time in which to file application for Writ of Certiorari or appeal to this Court. An extension of the Stay order was granted to and including April 18, 1967, in which to file application for certiorari with this Court. A further extension of the stay order was granted to and including April 28, 1967.

F.

REASONS FOR GRANTING THE WRIT, ARGUMENT AND AUTHORITIES

I.

Neither the United States District Court nor the United States Court of Appeals for the Fifth Circuit made an independent finding as to whether the Government was the owner of the chattels taxed or that Chrysler was acting as the purchasing agent of the Government and thereby the sales went from the vendors to the United States Government. The Supreme Court of Louisiana, in the two times this matter was before it, made only two findings of fact. In the first Appeal Chrysler Corporation vs. City of New Orleans, 238 La. 123, 114 So. 2d 579, (Appendix "D"), it held two things: It found as fact that the Government always was the owner of this property because the petition of Chrysler alleged this, and, because the matter was before the Court on an exception of no cause of action, this fact had to be taken as correct. It further held as a fact, which is more a conclusion of law, that Chrysler was the

purchasing agent of the Government because of its finding that the facility contract provided that the purchase orders of Chrysler had to be approved by the contracting officer before sent to the vendors. (See Appendix "D" at page 51.) 238 La. 123 at p. 147, 114 So. 2d 579 at p. 587. While the purchase orders had to be so approved, this did not make Chrysler the purchasing agent of the Government. Federal law fashions who is to be a purchasing agent of the Government and this Court has decided in *Alabama vs. King & Boozer*, 314 U.S. 1, 62 S. Ct. 43, 86 L. Ed. 3, that these approvals of the purchase orders of the contractor by the contracting officer does not make the contractor the purchasing agent of the Government. This erroneous finding of law by the Louisiana Supreme Court is not binding on the City of New Orleans, before the Federal Courts, on the doctrine of collateral estoppel. The finding by the Federal District Court and the Court of Appeals for the Fifth Circuit that the City was collaterally estopped as to these findings of fact and law by the Supreme Court of Louisiana, it is submitted, is error. In the second appeal Chrysler Corporation vs. City of New Orleans, 243 La. 498, 145 So. 2d 11, (Appendix "E") the Supreme Court of Louisiana made no additional finding of fact from the record but only reiterated its original position that the Government was the owner of this property, the title passing "directly from the various vendors to the United States." (See Appendix "E" at page 56.) 243 La. 498, at p. 505, 145 So. 2d 11, at p. 14.

There was and is a substantial difference as to a material fact, namely, was the Government the owner of this property. The Federal Courts in this matter say the Louisiana Supreme Court decided this fact and the City is collaterally estopped to challenge it. The Louisiana Supreme Court did not make such a finding from the record

but only stated, that this fact had to be taken as true because of the exception of no cause of action then before it. As to the finding of law by the Louisiana Supreme Court that Chrysler was acting as the purchasing agent of the Government (and thereby all sales would pass directly from the various vendors to the Government) was manifestly error of Federal law and certainly not binding as collateral estoppel on the City of New Orleans.

II.

Two days before the stay of the mandate by the Louisiana Supreme Court was to expire the Government and Chrysler (on December 28, 1962) filed the present suit in the United States District Court. It is true that the Government was an intervenor in Chrysler's suit for refund in the State courts. But the Government was in complete command of this litigation and was not a mere intervenor. It could have instructed Chrysler to file the refund suit in the Federal or State Courts, as the City ordinance allows the suit to be filed in either Court. See Appendix "G" attached. Instead the Government instructed Chrysler to file the suit for refund in the State Court. And there in the State courts, the Government and Chrysler briefed, pleaded and argued their State as well as Federal questions of fact and law. It is submitted that under *England vs. Louisiana Medical Board*, 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440, and *N.A.A.C.P. vs. Button*, 371 U.S. 415, 83 S. Ct. 328, 9 L. Ed. 2d 405, neither Chrysler nor the Government can relitigate these Federal and State questions of fact and law in the Federal courts. It is true that the Government was an intervenor in the State Courts. But the England and Button rule applies to such an intervenor; otherwise, the rule could be nulled by a co-plaintiff instructing the other plaintiff to file in the State Courts and the other plaintiff to intervene, and, then,

when both plaintiff and intervenor argue and plead both their Federal and State questions of fact and law in the State Courts, and, do not secure a judgment to their liking, the intervenor to plead it was only an intervenor and then re-litigate the Federal and State questions of fact and law in the Federal Courts. We must look through form to substance. And what is the substance of the England and Button rule? Precisely to prevent what Chrysler and the Government are here attempting, namely, to prohibit protracted litigation in the Federal Courts when State Courts have passed upon the claims of the parties as to Federal and State rights. The Government and Chrysler had every remedy available to them, **in the Federal Courts,** in 1962, when they secured the stay of the mandate of the Louisiana Supreme Court, to secure by writ of certiorari or by appeal to the United States Supreme Court their claim to Federally protected rights. (28 U.S.C.A. 1257.) It is submitted that under the *England* and *Button* rule to prevent protracted litigation their remedy in the Federal Courts was to the United States Supreme Court to secure their Federally protected rights and not in the Federal District Court.

It is true that the *England* and *Button* cases were in the context of abstention matters. But the rule is not limited to abstention matters. The rule is to prevent protracted litigation in the Federal and State courts. Particularly is the rule applicable in this matter where the respondents were not sent to the State Courts under abstention but having the right to sue in either the State or Federal Court sought out the State Courts to file their claim, and there, in the State courts, briefed and argued their claims as to State and Federal questions of fact and law and, finally, when their remedy was to the United

States Supreme Court they avoided this review and sought relief in the Federal District Court.

G.

CONCLUSION

In conclusion, it is respectfully submitted: first, that the City of New Orleans is not bound under the doctrine of collateral estoppel to an erroneous finding of law by the Louisiana Supreme Court that a Government contractor was a purchasing agent of the Government, because the purchase orders of the contractor were approved by the contracting officer, nor, to the corollary conclusion, that the Government was thereby the owner of the property from the various vendors, as the contractor was the purchasing agent of the Government.

Second, neither is the City, under collateral estoppel, bound to a finding of fact by the Louisiana Supreme Court that the Government was the owner of the chattels herein involved where that finding of fact was not an independent finding of fact but obligatory on the Court under Louisiana procedure because it was stated as a fact in the petition of the plaintiff, and the matter was before the court on an exception of no cause of action.

Third, that the Federal District Court did not have jurisdiction to entertain a suit where the plaintiffs argued and briefed their State, as well as Federal Questions of law and fact through the State Courts, and, having a right by law to writ of certiorari or appeal to the United States Supreme Court choose not to go to that Court on review, but file a new suit in the Federal District Court.

That the opposition of the City of New Orleans to the Motion for Summary Judgment was well taken, in the

light of the foregoing, and that a Writ of Certiorari should issue to the United States Court of Appeals for the Fifth Circuit and, in due course, the judgment of the lower court should be set aside.

Respectfully submitted,

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CERTIFICATE

I, Alvin J. Liska, hereby certify that a copy of the foregoing petition for a writ of certiorari has been served upon counsel of record for the United States Government, the Honorable Thurgood Marshall, Solicitor General of the United States, Department of Justice Building, Washington 25, D. C., Mr. Richard M. Roberts, Acting Assistant Attorney General, Messrs. Lee A. Jackson, I. Henry Kutz, J. Edward Shillingburg, Attorneys, Department of Justice, Washington, D. C., 20530; upon counsel of record for the Chrysler Corporation, Messrs. David J. Conroy and Guy C. Lyman, Jr., Milling, Saal, Saunders, Benson & Woodward, 1122 Whitney Building, New Orleans, Louisiana, 70130; and, upon Mr. Louis C. Lacour, United States Attorney for the Eastern District of Louisiana, Federal Courthouse Building, Royal and Conti Streets, New Orleans, Louisiana, by forwarding same to them at their addresses as hereinbefore set out by U. S. Mail, postage prepaid, air mail when required by the Rules of the Court, and deposited in the Post Office in New Orleans, Louisiana, on this

---------- day of ----------, 1967.

ALVIN J. LISKA,
Counsel of Record for Petitioners.